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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief in Opposition to Motion to Dismiss or Affirm.

Appellants in the above-entitled action, pursuant to Rule 16.4 of the Supreme Court Rules respectfully submit the following argument in opposition to Respondent's motion to dismiss or affirm and specifically in opposition to the question posed by Respondents as to whether the appeal should be dismissed as premature because Appellants filed Notice of Appeal to this Court "while *timely motions to amend the judgment* were pending before the three-judge Court."

Appellants respectfully submit that the above question is based on a false premise since there were *no*

timely motions under Rule 52 either *made* or *pending* at the time the purported amendment of judgment was filed.

The record on appeal duly certified to this Honorable Court on August 22, 1974, shows that Appellants made the following post-trial motions:

On June 14, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed a document entitled *Notice of Motion for Rehearing and for Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in Judgment and to Stay Judgment Pending Determination of that Motion.* This document (C.T. pp. 531-532) consists of two pages and notifies the parties that *a motion will be made on July 1, 1974.* Appellants Cecil Hicks and Oretta D. Sears, also on June 14, 1974, filed notice *that on July 1, 1974,* Appellants, *pursuant to Rule 60(b)(1),* would move *for Relief from Judgment, for Rehearing and for Stay of Judgment Pending Determination of this Motion.*

The Points and Authorities filed in support of Appellants' notices of motions clearly show that Appellants only sought to have the Court reconsider its legal position and vacate the judgment on jurisdictional grounds. The original three-judge Court made a finding of fact that there were related state prosecutions pending in the state Courts and concluded that as a matter of law the existence of related prosecutions of the theater employees did not affect the Federal Plaintiffs' rights to declaratory relief. The Points and Authorities reiterate the

existence of state prosecutions and ask the three-judge Court to reconsider its position as to its jurisdiction.

The Points and Authorities further pointed out that officers acting under authority of valid search warrants cannot be said to be in "bad faith." This argument was again one challenging a legal conclusion of the Court. Finally, the impropriety of the order to return was reiterated. The requested relief was *specifically* designated to be under Rule 60(b)(1) of the Federal Rules of Criminal Procedure (C.T. 533-A).

On June 24, 1974, the three-judge Court entered an order which reads:

> The motions of the defendants filed June 14, 1974 and scheduled for hearing on July 1, 1974 will be submitted and determined without oral hearing upon brief written statements of reasons in support and opposition pursuant to Rule 78 of the Federal Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED that the Clerk serve copies of this order by United States mail upon the attorneys for the parties appearing in this action.
>
> Dated this 24th day of June, 1974.
>
> Warren J. Ferguson
> WARREN J. FERGUSON
> United States District Judge

On July 5, 1974, a Monday and the last day in which to file a notice of appeal, Appellants who never intended their notice of motion to disturb the finality of the June 4, 1974 judgment, duly filed a notice of appeal to this Court and a protective notice of appeal to the Ninth Circuit.

The appeal was duly perfected and docketed with this Honorable Court on August 22, 1974.

Prior to that time, the Respondents had considered the decision as final and had in fact, sought and obtained orders to show cause to enforce all aspects of the judgment (See Jurisdictional Statement Appendix C).

On August 9, 1974, Appellants were enjoined by Judge Ferguson from conducting further seizures not only of the movie "Deep Throat" but also of the movie "Devil in Miss Jones." Such orders, again as pointed out in the jurisdictional statement, were made by one member of the three-judge Court and because made in this particular action can only be construed as having been made to enforce the judgment entered on June 4, 1974.

On September 30, 1974, in spite of the fact that the Points and Authorities show the intent to file a motion under Rule 60, because the *notice* of motion filed by some of Appellants *also* referred generally to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure, and because the *notice of motion* was coincidentally filed the *tenth* day after entry of judgment, the three-judge Court apparently elected to treat the "motions" as having been timely made under Rule 52 of the Federal Rules of Civil Procedure and entered its alleged supplemental opinion purporting to amend the

judgment in such a way as to require Appellants to either nullify the Appellate jurisdiction of this Honorable Court or to once more be subjected to Federal contempt proceedings.

The supplemental opinion, in fact, makes no material changes to its prior order. It merely reiterates its prior findings that the California obscenity laws are unconstitutional and purports to amend the second part of the judgment by substituting the following order to the priorly made order to return the films:

> At the January 29th proceeding in the Municipal Court, the assistant District Attorney, stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

> Except as the judgment will be so modified, the motions of the defendants are denied. (Attachment D.)

Appellants submit that the supplemental opinion and the modification of judgment are void because the three-judge Court had lost jurisdiction over the action since the notice of appeal had been timely filed on July 5, 1974 (a Monday). The record on appeal had been duly requested and the appeal docketed with this Honorable Court on August 22, 1974—nearly ten days prior to the entry of the supplemental opinion and of the amended judgment. See *e.g. Sumida v. Yumen,* (C.A. Hawaii 1969) 409 F.2d 654 cert. den. 405 U.S. 964; *O'Brien v. Avco* (D.C. N.Y. 1969) 309 F.Supp. 703; *Hogg v. United States* (C.A. Ky. 1969) 411 F.2d 578.

In the analogous case of *United States v. Frank B. Killian,* 269 F.2d 494, the United States Court of Appeals for the Sixth Circuit, pointed out that the notice of appeal operated to divest the district court of jurisdiction to rule on the government motion to reconsider, brought under Rule 60(b). The Court stated:

> Next to be considered is appellee's opinion here to dismiss the appeal as prematurely brought. Appellee's argument, briefly put, is that the Government's motion to reconsider and for relief from judgment suspended the finality of the order of dismissal, and so made the notice of appeal premature. There is no merit in this point. See: Fed. R.Civ.P. rule 60(b)(6); *Raughley v. Pennsylvania R. Co.*, 3 Cir., 1956, 230 F.2d 387.
>
> The Government's notice of appeal, filed August 4, 1958, operated to transfer jurisdiction to this

court (Fed. R.Civ.P. rule 73), and thereafter the District Court had no jurisdiction of the cause, other than to act in aid of the appeal as empowered by the Federal Rules of Civil Procedure. In re Federal Facilities Realty Trust, 7 Cir., 1955, 227 F.2d 651, 654. Having no jurisdiction to entertain the Government's motions for reconsideration and for leave to amend while an appeal was pending, the District Court's order overruling those motions was a nullity.

In *Keohane v. Swarco Inc.*, 320 F.2d 429 the Court concluded that a notice of appeal transfers jurisdiction even where a timely motion had been made under Rule 52. The Court there states:

> In our judgment, the motion to amend was timely made. It tolled the running of the time for appeal in No. 15,284. Rule 73; *Leishman v. Associate Wholesale Electric Co.*, 318 U.S. 203, 63 S.Ct. 543, 87 L.Ed. 714; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160. Since the District Court had not passed upon the motion to amend at the time the notice of appeal was filed, the judgment of dismissal was not final. The appeal was, therefore, premature. *Reconstruction Finance Corp. v. Mouat*, 184 F.2d 44 (C.A. 9); *Segundo v. United States*, 221 F.2d 296 (C.A. 9).
>
> The taking of the appeal even though from an interlocutory nonappealable order nevertheless transferred jurisdiction to the Court of Appeals. The orders entered by the District Court on January 16th, March 6th and March 14, 1963 were null and void since that court was without juris-

diction to make them after the appeal had been taken. *Merritt-Chapman & Scott Corp. v. City of Seattle,* 281 F.2d 896 (C.A. 9); *United States v. Frank B. Killian Co.,* 269 F.2d 491 (C.A. 6); *Hirsch v. United States,* 186 F.2d 524 (C.A. 6).

The three-judge Court should not be allowed to defeat the jurisdiction of this Court to hear a matter of so great an impact to the State of California by being allowed to consider a notice of motion of judgment as sufficient to satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure because served and filed ten days after entry. Although the Federal Court has great discretion in waiving defects in pleadings, it should not be allowed to construe a motion to be other than what it is. Notifying the clerk of the party's intention to file a motion for new trial *does not* constitute the filing of a motion for new trial and does not extend the time for appeal [See *e.g. Wagoner v. Fairview Consol. School Distr. No. 5* (C.A., Colo. 1961) 289 F.2d 480, cert. den. 368 U.S. 921]. A motion which asks for rehearing and for vacation of judgment cannot be treated as a motion to amend under Rule 52. Indeed, as has so often been stated, a motion under Rule 52 cannot be made to serve as a vehicle for rehearing (*Minneapolis Honeywell v. Midwestern Instrument* (D.C. Ill. 1960) 188 F.Supp. 248, affirmed 298 F.2d 36; *Heikkila v. Barber* (D.C. Cal. 1958) 164 F.Supp. 587; *Blair v. Delta Air Lines* (D.C. Fla. 1972) 344 F.Supp. 367).

Appellants' intended purpose, as to the type of motion they intended to file, is evidenced by the fact that the notices in conformance with Rule 3 of the Local Rules of the United States District Court, Central Dis-

trict of California, notify opposing party that the motion *shall* be made on July 1, 1974, a requirement which Rule 3 specifies is inapplicable to motions under Rule 52.

Similarly, neither notice of motion could in any way be considered as a motion under Rule 59 of the Federal Rules of Civil Procedure since the procedural requirements for such a motion which are set forth in Rule 17 of the Local Rules were deliberately bypassed.

Appellants further submit that even if the September 30, 1974 judgment were to be considered to have been properly entered, the prematurity of the notice of appeal should be disregarded as an irregularity not affecting substantial rights and should not be allowed to justify a dismissal of the appeal (See *Lemke v. United States,* 346 U.S. 325, 98 L.Ed. 3; *see also Curtiss Gallery and Library Inc. v. United States* (C.A. Cal. 1967) 388 F.2d 358; *Ruby v. Secretary of United States Navy* (C.A. 9th 1966) 365 F.2d 385).

The supplemental opinion and the amended judgment, in fact, do not alter the jurisdiction of this Honorable Court. The judgment as amended is injunctive in nature. It is directed to state officials and its impact on enforcement of the state laws is far greater than was the original order to return.

As shown by the jurisdictional statement and by the record on appeal, the Appellate Department of the Orange County Superior Court on July 26, 1974, in an appeal taken in the state criminal proceedings, made a finding that the movies were properly seized and that prompt adversary hearing as required by *Heller v. New York* had been had. The order of the Appellate Department resulted from an appeal instituted by Ap-

pellant District Attorney of Orange County in the state criminal action in which Respondents herein are defendants. The three-judge Court now orders the same district attorney to "in good faith" petition for the return of the items declared non-returnable by the State Court. It asks the District Attorney to, in effect, tell the Municipal Court to directly violate the order of the State Appellate Court and to do so "in good faith."

The existence of the order is in such direct conflict with the interests of the People of the State of California in this case as to probably require the Attorney General to take over on behalf of the People since the District Attorney can no longer perform the function of his office because of the conflict of interest created by the order. The impact of such required intervention on the proper enforcement of the California laws is self-evident. Additionally, the order requires the District Attorney to act *against* the interests of the People he has a sworn duty to represent. It requires him to act *against* the valid orders of the State Court which orders he has a statutory duty to uphold. The order thus effectively frustrates the enforcement, operation *and* execution of the state laws.

The importance of this case which, as shown by the jurisdictional statement, is controlling on at least 17 other cases, is obvious. The disruption brought by the ruling of the three-judge Court to the particular criminal action is evidenced by the fact that the state criminal proceeding, in which jury selection was finally scheduled to begin on October 21, 1974, has been stayed by the Court of Appeal of the State of California, Fourth Appellate District, Division Two. That court, acting on the petition of Respondent Vincent Miranda in the

case of *Vincent Miranda v. Municipal Court of North Orange County Judicial District*, 4 Civ. 13914, NOC case NM7306675, on October 18, 1974, entered the following order:

> Temporary stay of trial granted pending decision on Petition for Writ of Prohibition.

The Petition, filed with that Court and of which the Court can take judicial notice, alleges that Vincent Miranda cannot be tried because the three-judge Court has declared the California obscenity laws to be unconstitutional and, as to him, the decision has *res judicata effect*. A copy of the petition is attached as Attachment A. If this contention of Respondent is correct, unless this Honorable Court grants relief, enforcement of the California obscenity laws will of necessity be unequal since the laws will be binding on some persons and not on others while the appeal in this case is pending.

Interestingly, a determination of the *res judicata* issue will require the State Appellate Court to determine the validity of the Federal Court order, thus possibly resulting in yet another conflicting decision entered in a collateral proceeding. Additionally, all cases dealing with California obscenity laws docketed with this Court are on Petition for Certiorari. The supplemental opinion refuses to consider the second *Miller* opinion of this Court as binding precedent and has rejected this Court's denial of certiorari as an indication of this Court's thinking. Rather it has considered the denials of certiorari as an indication of its own right to declare the California obscenity laws unconstitutional.

Accordingly, the above problems and conflicts can only be effectively resolved by this Honorable Court since, if the three-judge Court acted jurisdictionally, this Court has jurisdiction to act on the merits. Con-

versely, if the three-judge Court did not have jurisdiction over the action, this Court can still resolve the merits of the controversy by resolving the jurisdictional issue because, as most aptly pointed out by Stern and Grossman, *Supreme Court Practice*, Sec. 2.14, page 53:

> The three-judge-court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky*, 290 U.S. 30; *Flast v. Cohen*, 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court, as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255; *Swift & Co. v. Wickham*, 382 U.S. 111, 115; *Zemel v. Rusk*, 381 U.S. 1, 6; *Bell v. Waterfront Commission*, 279 F.2d 853 (C.A. 2).

As thereafter pointed at Section 2.17 at page 70:

> If there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States*, 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on

the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo,* 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra,* at 478.

In the case at hand, the jurisdictional statement and Judge Lydick's order (Appendix B, p. 22) show that the jurisdiction of the three-judge Court is based on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court in *Miller v. California,* .... U.S. ...., 41 L.Ed.2d 1033 dismissed an appeal presenting this identical issue "for want of a substantial Federal question." The basis for the three-judge Court jurisdiction in this case is thus clearly non-existent.

Although the three-judge Court purported to also base its jurisdiction on the alleged findings of harassment, those findings are contrary to the ones made by Judge Lydick—the judge who certified the case as to the constitutionality of the California statute. Had the case not been certified, Judge Lydick's findings would unquestionably be unassailable on appeal. (See *e.g. Sims v. Dial,* 350 F.Supp. 747 where a three-judge federal court rejected the "novel proposition of law" that actions paralleling the ones in the case at hand established bad faith harassment as a matter of law.)

Absent the presence of a substantial federal question as to the constitutionality of the statute, the three-judge Court *and* Judge Lydick should have dismissed the complaint.

In light of the above factors, should the Court determine that it has no jurisdiction in this action, reversal

of the three-judge Court decree and remand with directions to dismiss the complaint for want of jurisdiction would seem the most appropriate means to restore order to the procedural nightmare created by the presently existing conflicting orders of the State and Federal Courts.

Respectfully submitted,

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Attorney General, State of California,

JACK WINKLER,
Chief Assistant Attorney General,

ARLOW SMITH,
Assistant Attorney General,

ALVIN KNUDSON,
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Assistant District Attorney,

By ORETTA D. SEARS,
Deputy District Attorney,
Head, Writs & Appeals Section,
Attorneys for Appellants.

APPENDIX.

Petition for Writ of Prohibition and Application for Temporary Stay and Memorandum of Points and Authorities in Support Thereof.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

Fleishman, McDaniel, Brown & Weston, 6922 Hollywood Boulevard, Suite 718, Hollywood, California 90028, [213] 466-6171. By: JOHN H. WESTON, Attorneys for Petitioner.

Petition for Writ of Prohibition and Application for Temporary Stay.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

TO: THE HONORABLE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Petitioner, VINCENT MIRANDA, respectfully applies for a Writ of Prohibition by this verified petition, and alleges and represents to this Court as follows:

I

Petitioner is a defendant in an action entitled *People of the State of California v. Edward Lee Bailey, James Samuel Lytell, Vincent Miranda and Walnut Properties, Inc.*, No. NM 73 06675, now pending before Respondent Court, which matter is presently set for trial on October 21, 1974.

II

Respondent is the Municipal Court of the North Orange County Judicial District, County of Orange, State of California.

III

The Real Party in Interest herein is The People of the State of California, plaintiff in the aforesaid action now pending in Respondent Court.

IV

On January 15, 1974, an amended complaint was filed in Respondent Court alleging that Petitioner, VINCENT MIRANDA, and the other parties named in paragraph I of this petition, violated the State obscenity statute, Penal Code § 311.2, by exhibition of the film "Deep Throat" during the month of November, 1973.

V

Prior to the filing of the aforesaid amended complaint in Respondent Court, Petitioner VINCENT MI-

RANDA was charged with violating Penal Code § 311.2 by exhibition of the film "Deep Throat" in an action entitled *People of the State of California v. Vincent Miranda,* Municipal Court of the Beverly Hills Judicial District, County of Los Angeles, State of California, No. M-34539. Jury trial was had in the aforesaid action, resulting in a declaration of mistrial on October 18, 1973, after the foreman of the jury advised the court that the jury stood nine for acquittal and three for conviction and were unable to reach a verdict.

VI

All evidence adduced by Petitioner in the aforesaid Beverly Hills trial was on the issue of the non-obscenity of the film "Deep Throat". All of the jurors who voted for acquittal based their decision solely on the issue of obscenity. Following the mistrial, on June 18, 1974, the charge against Petitioner was dismissed by the Municipal Court of the Beverly Hills Judicial District, pursuant to Penal Code § 1385, upon the motion of the prosecution. The said motion to dismiss was made and granted on the basis that the prosecution was unable to prove the alleged obscenity of the film "Deep Throat".

VII

As a result of the foregoing facts, the prosecution now pending against Petitioner in Respondent Court is barred by the double jeopardy, collateral estoppel, due process and free speech and press provisions of the First, Fifth and Fourteenth Amendments to the United States Constitution, by the provisions of Article I, Sections 9 and 13 of the California Constitution, and by the provisions of Penal Code § 1387.

VIII

In the action pending against Petitioner in Respondent Court, the plaintiff therein, The People of the State of California, is represented by the District Attorney for the County of Orange, CECIL HICKS. Petitioner, VINCENT MIRANDA, brought an action in the United States District Court for the Central District of California entitled *Vincent Miranda, et al. v. Cecil Hicks, et al.*, Civil No. 73-2775-F, naming as defendants, *inter alia*, the said District Attorney of Orange County, Cecil Hicks. The action alleged that the California obscenity statutes are unconstitutional, violating the First and Fourteenth Amendments to the United States Constitution. In a final judgment, entered on June 4, 1974, and amended September 30, 1974, the said court issued a declaratory judgment that the California obscenity statutes are unconstitutional and do violate the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution. [Copies of the Memorandum Opinion and Judgment, and the Supplemental Memorandum Opinion and Amendment to Judgment in *Miranda, et al. v. Hicks, et al.* are attached hereto as EXHIBIT A.]

IX

In the aforesaid federal action brought by Petitioner, VINCENT MIRANDA, against CECIL HICKS and others, the Federal Court found that the prosecution now pending against Petitioner VINCENT MIRANDA in Respondent Court was brought in bad faith for the purpose of harassment. The Federal Court found the following facts in its Supplemental Memorandum Opinion filed September 30, 1974:

(a) On the date of the filing of the Federal Complaint by Petitioner VINCENT MIRANDA, November 29, 1973, there was pending in the Municipal Court of the North Orange County Judicial District an eight-count misdemeanor complaint against EDWARD LEE BAILEY and JAMES SAMUEL LYTELL in connection with the exhibition of "Deep Throat" in Buena Park.

(b) Neither Mr. Bailey nor Mr. Lytell are parties to the federal action.

(c) The Complaint in the federal action was served upon the District Attorney of Orange County, CECIL HICKS, by a Deputy United States Marshal on January 14, 1974; the other defendants in the federal action had been served a few days before.

(d) On January 15, 1974, a day after service of the Federal Complaint upon CECIL HICKS, the criminal complaint in the Municipal Court of the North Orange County Judicial District, Respondent herein, was amended by District Attorney HICKS to name Petitioner VINCENT MIRANDA as a defendant.

X

The Federal Court in *Miranda v. Hicks* found that the facts set forth in the preceding paragraph "only [serve] to strengthen the previous finding of bad faith and harassment. Reasonable people could certainly infer prosecutorial misconduct from the [foregoing] course of action. . . ."

> "No explanation is given why criminal charges were not instituted against the plaintiffs here [VINCENT MIRANDA and WALNUT PROPERTIES, INC.] until after the filing and service of the complaint in this action. Without such an

explanation it is reasonable for the Court to conclude that the institution of the criminal proceedings was in retaliation for the attempt by plaintiffs to have their constitutional rights judicially determined in this Court." [Supplemental Memorandum Opinion, p. 4.]

XI

As a result of the final judgment entered in the aforesaid action of Miranda v. Hicks, Respondent Court is without jurisdiction of the offenses charged against Petitioner VINCENT MIRANDA in the amended complaint now pending before Respondent Court, because the said prosecution was brought in bad faith for the purpose of harassing said Petitioner, and the said prosecution accordingly deprives Petitioner of due process of law, denies him the equal protection of the laws, and abridges the exercise of freedoms of speech and press, contrary to the First and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 11, 13 and 21 of the California Constitution.

XII

As a further result of the final judgment entered in the aforesaid action of *Miranda v. Hicks,* the prosecution now pending against Petitioner VINCENT MIRANDA in Respondent Court is barred by the doctrine of *res judicata,* the unconstitutionality of Penal Code § 311.2 having been determined on the merits in a final judgment rendered between Petitioner VINCENT MIRANDA and CECIL HICKS, District Attorney of Orange County.

XIII

On October 15, 1974, Petitioner moved Respondent Court, the Honorable JAMES COOK, Judge Presiding, to enter a plea of once in jeopardy and to dismiss the aforesaid amended complaint against Petitioner VINCENT MIRANDA. The motions were made upon the grounds set forth in the preceding paragraphs of this petition. On October 15, 1974, Respondent Court denied Petitioner's motions.

XIV

On October 15, 1974, Petitioner filed a petition for writ of prohibition in the Superior Court of the State of California for the County of Orange. The petition set forth all of the aforementioned allegations contained in the petition herein. The petition alleged, in addition, that Petitioner was the party directly interested in this proceeding and that parties in addition to the Respondent Court who were interested and who would be affected by the petition were The People of the State of California. It was alleged that the petition for writ of prohibition was filed with the court, no appeal lying from the order of the Respondent Court denying the motions to enter a plea of once in jeopardy and to dismiss the aforesaid amended complaint, and that Petitioner has no other plain, speedy or adequate remedy at law.

XV

For all of the foregoing reasons, Petitioner prayed that an alternative writ of prohibition be issued, restraining the Respondent Court, its officers and agents, and all persons acting by and through its orders, from taking any further proceedings or steps, including trial, as regards this Petitioner in *People of the State of*

California v. Edward Lee Bailey, James Samuel Lytell, Vincent Miranda and Walnut Properties, Inc., No. NM 73 06675, in the Municipal Court of the North Orange County Judicial District, County of Orange, State of California, until further order of the court, and that Respondent Court be directed and required to show cause before the court, at a specified time and place, why it should not be absolutely and forever restrained from taking any further proceedings against, or making any other orders affecting, Petitioner herein, and for such other and further relief to which the Petitioner may be entitled.

XVI

On October 15, 1974, the Superior Court of the State of California for the County of Orange, the Honorable MARK A. SODEN, Judge Presiding, declined to issue the prayed for alternative writ of prohibition and order to show cause, without written opinion (*Vincent Miranda v. Municipal Court*, No. 219909).

XVII

Unless restrained by this Court, Respondent Court will proceed to try Petitioner on the said amended complaint, commencing October 21, 1974.

XVIII

Respondent Court has no jurisdiction to proceed with the trial of said action against Petitioner for the reasons set forth in paragraphs VII, XI and XII of this petition.

XIX

Petitioner has no plain, speedy and adequate remedy in the ordinary course of law, no appeal lying from the denial by Respondent Court of Petitioner's motion to dismiss the said amended complaint.

XX

Petitioner avers that he has not committed the offense charged in the complaint herein and he is innocent of any such offense, and that at all times acted lawfully and within constitutionally protected areas of conduct.

WHEREFORE, Petitioner prays that this Court issue an alternative writ of prohibition, restraining Respondent Court from proceeding to try Petitioner VINCENT MIRANDA in the action entitled *People of the State of California v. Edward Lee Bailey, et al.*, No. NM 73 06675, and to show cause before this Court, at a time and place to be designated by this Court, why it should not be permanently restrained from so doing, and for such other and further relief as to this Court seems just, and for a temporary stay restraining Respondent Court from proceeding to try Petitioner VINCENT MIRANDA in the said action pending consideration by this Court of the Petitioner's application for an alternative writ of prohibition.

DATED: October 16, 1974.

FLEISHMAN, McDANIEL, BROWN
& WESTON

BY /s/ John H. Weston
JOHN H. WESTON
Attorneys for Petitioner

Memorandum of Points and Authorities in Support of Petition for Writ of Prohibition.

In the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Vincent Miranda, Petitioner, vs. Municipal Court of the North Orange County Judicial District, County of Orange, State of California, Respondent, People of the State of California, Real Party in Interest. No. 4 CIV 13914.

I

THE PRESENT PROSECUTION AGAINST PETITIONER VINCENT MIRANDA IS BARRED BY THE DOUBLE JEOPARDY, COLLATERAL ESTOPPEL, DUE PROCESS, AND FREE SPEECH AND PRESS PROVISIONS OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 13 OF THE CALIFORNIA CONSTITUTION, AND BY THE PROVISIONS OF PENAL CODE SECTION 1387.

The doctrine of collateral estoppel in criminal trials is an integral part of the protection against double jeopardy guaranteed by the Fifth and Fourteenth Amendments. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson,* 397 U.S. 436, 443, 90 S.Ct. 1189, 1194 (1970). See also, *Simpson v. Florida,* 403 U.S. 394, 91 S.Ct. 1801 (1971); *Harris v. Washington,* 404 U.S.55, 92 S.Ct. 183 (1971).

The verified petition herein shows that the issue of obscenity of the film "Deep Throat" has been finally litigated between Petitioner VINCENT MIRANDA and The People of the State of California in the prior Beverly Hills trial. Although that trial resulted in a hung jury, nine to three for acquittal, the action was subsequently dismissed by the Court pursuant to Penal Code Section 1385 on motion of the prosecutor made on the grounds that the State was unable to prove the obscenity of the film. Penal Code Section 1387 provides that:

> "An order for the dismissal of the action, made as provided in this chapter, [pursuant to Penal Code §1385] is a bar to any other prosecution for the same offense if it is a misdemeanor. . . ."

Accordingly, the former trial and dismissal operates as a final judgment between VINCENT MIRANDA and The People of the State of California with respect to the charge that exhibition of the film "Deep Throat" constitutes a violation of the state obscenity statute. The statutory and constitutional provisions discussed above preclude another trial of the same charge. Since the substantive law of obscenity in the State of California requires that alleged obscenity be measured against statewide standards, the fact that the present prosecution alleges exhibition of the film in Orange County rather than Los Angeles County does not affect the applicability of the doctrines of double jeopardy and collateral estoppel. See, *In re Giannini,* 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968); *Miller v. California,* 413 U.S.15, 93 S.Ct. 2607.

II

RESPONDENT COURT IS WITHOUT JURISDICTION OF THE OFFENSES CHARGED AGAINST PETITIONER VINCENT MIRANDA IN THE AMENDED COMPLAINT HEREIN BECAUSE THE SAID PROSECUTION WAS BROUGHT IN BAD FAITH FOR THE PURPOSE OF HARASSING SAID DEFENDANT, AND THE INSTANT PROSECUTION ACCORDINGLY DEPRIVES SAID PETITIONER OF DUE PROCESS OF LAW, DENIES HIM THE EQUAL PROTECTION OF THE LAWS, AND ABRIDGES THE EXERCISE OF FREEDOMS OF SPEECH AND PRESS, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 11, 13 AND 21 OF THE CALIFORNIA CONSTITUTION.

Miranda v. Hicks,
U.S.D.C. C.D. Cal. Civil No. 73-2775-F (June 4, 1974, as amended September 30, 1974).

III

THE PRESENT PROSECUTION AGAINST PETITIONER VINCENT MIRANDA IS BARRED BY THE DOCTRINE OF RES JUDICATA, THE UNCONSTITUTIONALITY OF PENAL CODE SECTION 311, ET SEQ. HAVING BEEN DETERMINED ON THE MERITS IN A FINAL JUDGMENT RENDERED BETWEEN VINCENT MIRANDA AND CECIL HICKS, DISTRICT ATTORNEY OF ORANGE COUNTY, IN THE ACTION ENTITLED

MIRANDA v. HICKS, U.S.D.C. C.D. CAL. CIVIL NO. 73-2775-F, THE FINAL JUDGMENT HAVING BEEN ENTERED ON JUNE 4, 1974, AND AMENDED ON SEPTEMBER 30, 1974.

Steffel v. Thompson,
94 S.Ct.1209 .(See, concurring opinion of Mr. Justice White, 94 S.Ct. at 1224);

28 U.S.C. § 2201
[A "declaration shall have the force and effect of a final judgment or decree".]

CONCLUSION

For all of the foregoing reasons, a writ of prohibition should issue.

Respectfully submitted,

FLEISHMAN, McDANIEL, BROWN & WESTON
BY /s /John H. Weston
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